

Antitrust Aspects of Health Planning

The refusal by Blue Cross to reimburse an acute care hospital as a "participating" provider on the basis that the hospital failed to obtain the approval of a regional health systems agency was held immune from the antitrust laws. *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 628 F.2d 1050 (8th Cir. 1980), cert. granted, 49 U.S.L.W. 3525 (January 26, 1981, No. 80-802).

This case involved the interplay of the National Health Planning and Resources Development Act of 1974 (hereafter called the Planning Act), 42 U.S.C. §§ 300k, et seq., and the Sherman Antitrust Act, as amended, 15 U.S.C. §§ 1, 2. The National Gerimedical Hospital and Gerontology Center (hereafter referred to as National), a fully accredited, acute care community hospital that opened in 1978, had sued Blue Cross of Kansas City (hereafter referred to simply as Blue Cross) and the Blue Cross Association (BCA), alleging that these organizations had conspired with the Mid-American Health Systems Agency, Inc. (MAHSA), a federally assisted regional health systems agency, and others to boycott National and control its market entry in violation of the antitrust laws. The District Court for the Western District of Missouri found that the actions of Blue Cross and the BCA were immune from antitrust scrutiny under the doctrine of implied immunity, *National Gerimedical Hospital v. Blue Cross*, 479 F. Supp. 1012 (W.D. No. 1979). On appeal, the Eighth Circuit Court of Appeals affirmed that decision.

Blue Cross is a major provider of health care reimbursement plans in western Missouri and eastern Kansas. All acute care hospitals in this service area except National have contracts with it and are thereby designated "participating" member hospitals. This designation entitles a hospital to receive payment from Blue Cross for 100 percent of all covered hospital

services provided to Blue Cross subscribers. Nonparticipating hospitals, on the other hand, do not receive direct payment from Blue Cross. Instead, Blue Cross reimburses its subscribers for 80 percent of covered services performed at nonparticipating hospitals, and the subscribers, in turn, pay these institutions.

NO FINDING OF NEED

In 1978 Blue Cross refused to enter into a participating member contract with National for the sole reason that the hospital had not obtained a "finding of need" for its new facility from MAHSA, the regional health systems agency designated under the Planning Act. Blue Cross had imposed the "finding of need" requirement on participating member contracts in accordance with BCA policy guidelines adopted in 1976. However, neither Federal nor Missouri law required National to obtain MAHSA's approval at the time in question. (Missouri subsequently enacted a Certificate of Need Law that became fully effective in October 1980.)

The stated purpose of the Planning Act is "to facilitate the development of recommendations for a national health planning policy, to augment area-wide and State planning for health services, manpower, and facilities, and to authorize financial assistance for the development of resources to further that policy." 42 U.S.C. § 300k (b). To achieve these goals, the Act provides for the establishment of health systems agencies (HSAs), which

are assigned a number of functions designed to prevent unnecessary duplication of health resources. 42 U.S.C. § 300l-2(a). Under 42 U.S.C. § 300l-2(b)(2), HSAs are responsible for formulating health systems plans for their designated service areas. In implementing its plan, an HSA is required to seek the voluntary assistance of interested public and private entities. 42 U.S.C. § 300l-2(c)(1). The District Court found that the actions of Blue Cross with respect to National constituted voluntary cooperation with metropolitan Kansas City's health planning process and, therefore, fell within the scope of these statutory provisions. 379 F. Supp. at 1020-21.

The antitrust laws were adopted on the premise that the public interest will be served best when business enterprises are compelled to compete in markets free of anti-competitive restraint. 628 F.2d at 1055. In general, Federal and State antitrust laws prohibit business arrangements and other transactions that constitute combinations in restraint of trade or that abuse an entity's monopoly power.

PLANNING IMPLIEDLY EXEMPT

Although the Planning Act does not expressly exempt from the antitrust laws the planning activities challenged in this case, the Eighth Circuit Court affirmed the lower court's holding that the Act creates an "implied exemption" for this conduct. 628 F.2d at 1057-57. In reaching this conclusion, the appellate court relied upon the doctrine of implied immunity. This doctrine is applicable only when there is (a) a clear repugnancy between the antitrust laws and the specific conduct at issue and (b) a congressional intent that the antitrust laws should not be applied to that conduct. 628 F.2d at 1054. Even in those instances, courts have tended to limit the doctrine's ap-

plication to the minimum extent necessary to make a regulatory scheme work. 628 F.2d at 1054.

After reviewing the statutory framework giving rise to this lawsuit and the legislative history of the Planning Act, the Eighth Circuit Court held that an implied immunity from the antitrust laws did exist in this case. The Court reasoned that if the voluntary cooperation of Blue Cross of Kansas City with MAHSA's plan was deemed to be an antitrust violation, then a major provision of the Planning Act would be without legal effect. 628 F.2d at 1054. In view of legislative history to the contrary, the Court reasoned that it was unlikely that the Congress intended such a result. 628 F.2d at 1056-57.

CONCERN ABOUT SUITS

In essence, the Eighth Circuit Court's decision indicates that voluntary private action within the scope of the Planning Act (that is, planning activities not under the direct mandate of a Federal or State agency), such as the reliance of a third party payor on a regional health systems plan, may be undertaken free of antitrust limitations. This ruling comes at a time of increased concern and confusion about antitrust challenges to health planning.

Two other cases involving health planning and the doctrine of implied immunity are currently pending in the Federal courts. In one, *Huron Valley Hospital, Inc. v. City of Pontiac*, 477 F. Supp. 1301 (E.D. Mich. 1979), appeal docketed, No. 79-1265 (6th Cir. May 16, 1979), the antitrust action was dismissed on grounds that the doctrine of implied immunity and other legal theories insulated the health planning at issue. The other case, *North Carolina v. P.T.A. Asheville, Inc.*, Civ. No. A-C-80-29 (W.D. N.C., filed Feb. 22, 1980), was an antitrust challenge to the defendant's efforts to acquire two hospitals, an acquisition subject to approval of the State Health Planning and Development Agency.

On January 26, 1981, the Supreme Court agreed to review the Eighth Circuit Court's decision. The justices are expected to hear arguments in April 1981.

—PETER A. PAVARINI, Attorney Advisor, Office of the General Counsel, Department of Health and Human Services.

education notes

Occupational health courses. The Rocky Mountain Center for Occupational and Environmental Health, University of Utah, Salt Lake City, has announced that the following courses will be held in 1981: Occupational Safety and Health in Mining Industry, June 15-19; Occupational Safety and Health Law (for occupational health professionals, industrial hygienists, attorneys, physicians, and so forth), June 22-26; Occupational Health Nursing, June 22-26; Advanced Occupational Respiratory Protection, July 13-17 and October 26-30; and Industrial Hygiene Chemistry (NIOSH—National Institute of Occupational Safety and Health—No. 590), Aug. 3-7 and November 16-20.

For further information, contact Katharine C. Bloch, Director, C.E., Rocky Mountain Center for Occupational and Environmental Health, Bldg. 112, University of Utah, Salt Lake City, Utah 84112, telephone (801) 581-5710.

Course in maternal and child nutrition. The Department of Nutrition, Case Western Reserve University, Cleveland, Ohio, will offer the Fourth Annual Intensive Course in Maternal and Child Nutrition, June 14-19, 1981. Entitled "1981 Nutrition and the Quality of Life," the course will include these topics: new advances in nutrition science; techniques in nutrition assessment; and the physiology, growth, and feeding of children. The annual Helen Hunscher lecture will feature Alex Roche, MD, Fels Research Institute, known for his

work on the growth of children. Continuing education hours have been applied for.

For further information, contact Karen M. Fiedler, PhD, M & C 1981, Department of Nutrition, Case Western Reserve University, Cleveland, Ohio 44106, telephone (216) 368-2440.

Workshop on drug and alcohol use. The 23rd Annual Workshop on Drug and Alcohol Use will be held June 2-16, 1981, at Indiana University, Bloomington. Three hours of graduate credit, continuing education units, and non-credit enrollment are available. For further information, contact Dr. Ruth C. Engs, HPER 116, Health and Safety Education, Indiana University, Bloomington, Ind. 47505, telephone (812) 337-9581.

Graduate Summer Session in Epidemiology. The 1981 graduate summer session in epidemiology, sponsored by the Epidemiology Section of the American Public Health Association, the Association of Teachers of Preventive Medicine, and the American College of Preventive Medicine, will be presented at the University of Minnesota in Minneapolis through the School of Public Health, Health Sciences Center, and the Nolte Center for Continuing Education during the 3-week period June 21 to July 11, 1981.

These summer graduate sessions are designed primarily for teachers in medical schools, but postdoctoral fellows, graduate students, and residents in de-